
U.S. Department of Labor
Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, DC 20036

87-ERA-27

In the Matter of

MILTON SHUSTERMAN,
Complainant

vs.

EBASCO SERVICES, INC,
Employer

Milton Shusterman, Pro Se
" For the Claimant

Robert S. Hoshino, Jr., Esq.
Christopher Luis, Esq.
For the Employer

Before: GLENN ROBERT LAWRENCE
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the Energy Reorganization Act, Public Law 95-601, Section 210, 42 U.S.C. § 5851, which contains employee protection provisions, commonly referred to as whistleblower protection provisions, Generally, the provisions prohibit an employer from discharging or otherwise discriminating against any employee who engaged in protected activities.

The Complainant, Milton Shusterman, inititated these proceedings by filing a letter of complaint with the Wage and Hour Division of the United States Department of Labor on March 23, 1987. In his complaint he alleges discriminatory employment practices by EBASCO in violation of the whistleblower provisions. He contends that his discharge on

March 4, 1987 constitutes unlawful retaliation for his refusal to falsely qualify several nuclear construction material

---

[Page 2]

vendors.

Pursuant to 29 C.F.R. Part 24, the Wage and Hour Division conducted an investigation into the alleged violation. On May 1, 1987, the Wage and Hour Division notified the employer in writing that a fact-finding investigation had been conducted and that it was found that there was a direct connection between the protected activity and the employees termination. The employer timely filed an appeal from this determination by telegram to this office on May 6, 1987.

A hearing was held July 6 through July 9, 1987 in New York. Pursuant to consent of the parties, the time period within which the Secretary of Labor may issue his Decision and order was extended 90 days from August 3, 1987 the date the transcript was received.

The following findings of fact and conclusions of law are based upon my observation of the credibility and demeanor of the witnesses and upon an analysis of the entire record, arguments of the parties, applicable statutes, regulations, and case law.

Findings of Fact and Conclusion of Law and Discussion

1. Claimant is a graduate electrical engineer.

2. He commenced work as a senior engineer with Ebasco on August 7, 1978. (T 65)

3. He was the Vendor Evaluation Group Leader of the Quality Assurance Engineering Department from September 1980 until July 1983. Claimant had overall responsibility for the operation of that department and the Vendor Evaluation System. He scheduled audits of all suppliers of nuclear safety materials and equipment to verify quality assurance programs were implemented according to the code.

4. In May 1981, Mr. Shusterman found that the James C. White Company was not producing tube tracks as required by the Code of Federal Regulations (10 CFR 50, appendix B-Quality Assurance Program) (T 68). He testified that he was asked to delete his findings. No report was made to the Nuclear Regulatory Commission. On January 8, 1982 other qualified auditors found the parts satisfactory (T 77). Mr. Shusterman signed a letter on January 8, 1982 that after the re-audit the vendor was satisfactory (T 97).

[Page 3]

5. In February 1982, Mr. Shusterman made a vendor evaluation of Cardinal Industrial Products corporation. The vendor was found to be unsatisfactory. The Company continued to use the vendor by placing them on the supplemental vendor's list.

6. In February 1982 he conducted an audit on Automatic Switch Co. He gave them an unsatisfactory rating. Nevertheless, his finding was by-passed and purchases were made from the vendor. Claimant made no report to the Nuclear Regulatory Commission (T 140).

7. Similar problems developed with Namco and ITT. General Controls. He was largely by-passed in those activities and vendor approvals were obtained through other means. Complainant in this case also did not report the possible violations, as noted above, to the, Nuclear Regulatory Commission.

8. In July 1983, he asked to be reassigned as he stated he could not go along with the approval of unsatisfactory vendors.

9. Though he continued to work in quality assurance, he no longer performed vendor evaluations.

10. The years claimant spent from 1984 to 1987 appeared to be rather unproductive. He was given some relatively low skill work and he declined on one or more occasions to take assignments that required traveling and temporary duty (T 689).

11. Brian Gibson of Ebasco Inc. Quality Assurance Auditing manager on January, 1987 was assigned to rate all members of Mr. Shusterman's section in anticipation of a reduction in force inasmuch as their-6 was experienced a substantial over run in January and February 1987. The rationale of the rating scheme was set out in R1 through R 5.

12. In summary the ratings included employees; 1. A. Performance, 1. contribution this year; 2. contributions last year, 3. skill, ability, experience or education; B Marketability, 1. Meets todays market, 2. meets future markets; C, Potential: 1. versatility, 2. leadership, 3. salary bracket.

13. Mr. Shusterman was rated as follows:

A. 1. 1986 had field assignment in Colorado; some support in New York office, many weeks in New York an Ohio. Some contribution to Department revenue, Numerical Rating (NR): 2

[Page 4]

2. overall for past three years contribution to Department not substantial; considerable time in ohio due to lack of work. Not a self starter. Contributes only when given specific well defined tasks, prefers to work alone or with person(s) of his choice. NR: 1

3. Skill strengths are in Supplier Evaluation; extensive experience; does detailed audits, extensive preparation. Current demand for supplier audits/evaluations in nuclear field very low, also minimal in non-nuclear areas. Skills in some demand in Non-HQ locations; refused consideration for Comanche Peak assignment. NR:2

B. 1. As noted in A. 3, has skills but current market conditions show small demand. NR:O

2. Do not foresee significant change in market, either HQ or site; HQ-based audits and supplier evaluations in Nuclear not likely to increase. Non-nuclear evaluations not good prospect also. NR:O

C. 1. I have not seen a capability for growth on M.S. Part in current department area of business. Potential in another discpline is unknown. NR:O

2. Has not shown particular indication of leadership or management capability; accepts specific, well-defined tasks only. NR:O

3. Is currently 3rd quintile. NR:O

D. Appraisal for 19877, based on current and past experience will no be higher (better) than 3. NR;l

E. Although accepted certain site assignments in past, was only when it was clear that there was no other work available, and the alternative might be be work. Has since referred consideration for Comanche Peak either short term or six months basis. NR:1

Total NR:7

10. Claimant was terminated March 4, 1987 as one of 4 reductions in force (RIF) out of a group of 19. There were 17 employees rated above the claimant.

Discussion and Conclusion

The appropriate legal standard for whistleblower cases filed

---

under 42 U.S.C. § 5851 is essentially that of a "but for" test. Whistleblower cases arising under the Energy Reorganization Act may be analogized to certain cases arising under the National Labor Relations Act. *See Consolidated Edison Co. of New York v. Donovan* 673 F.2d 61 (2d Cir. 1982). Thus, the standard in *Wright Line, a div. of Wright Line, Inc*., 251 NLRB 1083 (1980), *aff'd sub. nom NLRB v. Wright Line*, 662 F.2d 899 (1st Cir. 1981), applies to whistle- blower cases. That standard requires the complainant to make a prima facie showing that supports the inference that that the employee's protected conduct was a "motivating factor" in the employer's decision. In other words, the

employee would not have been adversely treated but for his engaging in the protected activity.

The evidence does not support the view that claimants protected activity was the motivating factor in his discharge. The employer's witnesses credibily testified otherwise. Further , it was over 4 years since he had a conflict with his employer over quality assurance. Its strain's credibility to believe, as the complainant argues, that the employer was in affect, waiting in ambush those 4 years for an opportunity to retaliate against him.

Complainant, did not report the employer to the Nuclear Regulatory Commissioner nor any Government authority as far as the record discloses. Further, he more or less concedes that he was not threatened directly or by implication (T 679). He was not told, though he had numerous conversations with this supervisors, that he must change his findings or he would in any way be affected in his employment status. Rather, it was he who took the initiative to remove himself from the area of conflict. The employer agreed to this request and it would appear from this record made an effort to find him employment with the company in other areas. However, there wasn't that much work available and the complainant, for perhaps his own good reasons seemed to decline offers of expanded activity such as the assignment to Comanche Peak, Texas.

His refusal to perform expanded activities were not shown to be in support of any protected activity or an effort to avoid committing inproprieties. it does not appear that the employer's activities in offering such assignments or its other efforts during the last 4 years were in any manner pretextual or motivated by amimus in the comtemplation of the whistleblower statute.

Complainant has not shown the other three employee who were RIFED with him were RIFED on other then proper grounds. Rather, the

---

contention of Mr. Shusterman that one or more of the other RIFED employees (T 684) were RIFED as a cover for the retaliatory discharge of the Complainant is not crebible (T 684).

The lengthly testimony on how the employees were rated as a basis for the RIF is subject to argument. However, the witness who rated the 19 employees seemed reasonable in his findings. Though Mr. Shusterman could have been rated higher in several categories there appeared to be no animus or retaliatory motive in the ratings he was given. Certainly his inclination to refuse other activities was for his own convenience. These refusals were a reasonable basis for rating him down.

Further, the ratings seemed to reflect an honest business judgment rather than any hostile motive. one could argue that the chain of circumstances that began with the complainant's rejection of the quality assurance work resulted in his being RIFED 4 years

later. However, this would appear to be a philosophical abstraction and entirely too remote and lack certainty from a legal standpoint. The evidence and testimony at this hearing did not establish that the complainant was RIF'ed for retaliatory motive.

RECOMMENDED ORDER

1. That the Complaint be dismissed.

GLENN ROBERT LAWRENCE
Administrative Law Judge

Dated: SEP 25, 1987
Washington, D.C.

GRL:crg